SUPREME COURT NO. 85679-6

SUPREME COURT
STATE OF WASHINGTON

In Re: THE ESTATE OF ASHLIE BUNCH:

AMY KOZEL,
Petitioner

v.

MCGRAW RESIDENTIAL CENTER d/b/a
SEATTLE CHILDREN'S HOME and
THE ESTATE OF ASHLIE BUNCH,
Respondents.

RESPONDENT MCGRAW RESIDENTIAL CENTER'S SUPPLEMENTAL BRIEF TO SUPREME COURT

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I. IDENTIFICATION OF RESPONDENT

Respondent McGraw Residential Center d/b/a Seattle Children's Home ("McGraw"), the defendant in the underlying case.

II. INTRODUCTION TO SUPPLEMENTAL BRIEF

The Court of Appeals held that Petitioner Amy Kozel ("Kozel"), who had not regularly contributed to her minor child Ashlie's emotional, psychological or financial support during the last five years of Ashlie's life, did not have standing to assert a parental loss of consortium claim under RCW 4.24.010. In her petition to this Court, Kozel focuses on whether there is a temporal element to the construction of RCW 4.24.010.

Kozel appears to have conceded in her Petition that she did not regularly contribute to Ashlie's emotional, psychological or financial support during the last five years of Ashlie's life. She asks this Court to reinterpret the statute to provide that a parent who has at any time in the distant past contributed to their minor child's support has standing to assert a parental loss of consortium claim under the statute.

III. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals Correctly Interpreted RCW 4.24.010.

Kozel argued in her Petition that the Court of Appeals held that the parent's support, in order to qualify as regular, "must occur in the

temporal period *immediately preceding* the death or injury." (*Petition*, p.5; emphasis added). This is not true. The Court of Appeals held:

> RCW 4.24.010 creates a statutory cause of action for either or both parents that did not exist at common law. Without the death of Ashlie, no claim for destruction of any parent-child relationship between her and either parent would exist. Thus, it is reasonable to strictly construe this statute, which is in derogation of the common law, to limit its application to a time at or near the time of the death or injury of the minor child.

Estate of Bunch v. McGraw Residential Ctr., 159 Wash.App. 852, 248 P.3d 565, 572 (2011). The Court of Appeals was correct.

1. The Temporal Limitation on When the Parent Regularly Contributed to the Child's Support is Consistent with the Statute's Language and Intent.

RCW 4.24.010 provides in relevant part:

> A mother or father, or both, **who has regularly contributed to the support of his or her minor child**, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.
>
> This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.
>
> * * *
>
> In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

RCW 4.24.010 (emphasis added).[1] Support under the statute encompasses emotional, psychological, and financial support. *Postema v. Postema Enterprises, Inc.*, 118 Wn.App. 185, 198-99, 72 P.3d 1122 (2003).

According to the plain language of the statute, not every parent may assert a loss of consortium claim for a minor child. The threshold that a parent "has regularly contributed" must be given effect.

Kozel argues that the statute was only intended to preclude claims by "deadbeat dads" who "never" contributed to their child's support. (*Petition*, p.11). But the Legislature did not say that all parents may bring a claim except those who never contributed to the child's support. Nor did the Legislature say that any parent who contributed to support at any time could bring a claim.

Kozel also asserts that the phrases "has regularly contributed" or "has had significant involvement" (in the statement of legislative intent) refer to a completed past tense action. (*Petition*, pp.5-6). In fact, these constructions are in the present perfect tense, signifying an action which

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[1] In 1998, the legislature made the following statement of intent:

> The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, **if the mother or father has had significant involvement in the child's life,** including but not limited to, emotional, psychological, or financial support.

Laws of 1998, ch.237, § 1 (emphasis added). The court in *Philippides v. Bernard*, 151 Wn.2d 376, 384, 88 P.3d 939 (2004) held that the intent section "specifies that the parent of a minor child must have 'significant involvement' in the child's life in order to recover." *Id.* at 384.

began in the past and continue to the present. In other words, the action (support) must begin prior to the injury and be ongoing at the time of the injury.

If Kozel's argument were accepted, then any parent who supported their child for the first two years of a child's life but thereafter abandoned the child and had no contact, for whatever reason, could assert a claim for loss of consortium after the child is injured at age sixteen. For that matter, if there were no temporal limitation, then any mother who gave birth and immediately abandoned her child could appear after the child is injured at any age and assert a claim, on a theory that carrying the child was providing "support." Kozel's interpretation would require the court to ignore the plain language of the statute. The only reasonable way to interpret when the contribution of support must have occurred is in relation to the time of the injury or death of the minor.

2. Statute Provides Threshold Which Parents Must Meet to Bring Claim.

Kozel argues it is up to the jury to consider the extent of parental involvement. (*Petition*, p.9). Kozel's argument seems to confuse the issue of whether a statutory threshold is met to assert a claim, with a trier of fact's determination of damages. Kozel cites the case *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971), but that case simply held the

trial court "cannot substitute **its views of damages** for those of the jury." *Id.* (emphasis added). The trial court's function in making a threshold determination is distinct from a jury determination regarding the extent of damages.

Kozel's motion to intervene was brought under Civil Rule 19, which addresses whether parties must be joined for a just adjudication. *Crosby v. County of Spokane*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999). The trial court had discretion, on the record before it, to determine whether the CR 19 motion should have been granted. *See, e.g., Freestone Capital Partners L.P. v. MKA Real Estate, supra*, 155 Wash.App. 643, 230 P.3d 625 (2010).

The record before the trial court revealed that Kozel's support of Ashlie ended five years prior to Ashlie's death, when Ashlie moved to Washington. It appears Kozel has abandoned her assertion that she regularly supported Ashlie during those last five years. Nonetheless, in the trial court, Kozel's arguments focused on whether she had regularly contributed to Ashlie's support during those last five years. The trial court had before it the declarations of Kozel and Mr. Bunch (Ashlie's father). Mr. Bunch's declaration was unrebutted. Kozel declined to submit any evidence in response and declined an opportunity for an evidentiary hearing. The paltry evidence in Kozel's declaration did not show she

"regularly" contributed to Ashlie's support or had "significant" involvement in Ashlie's life in the five years prior to Ashlie's death. Conversely, Mr. Bunch's declaration provided much greater detail concerning Kozel's lack of support of, involvement in, or interest in, Ashlie's life or her medical or mental health conditions during that five year period, including the last eight months of Ashlie's life when Ashlie resided at McGraw and Kozel had no contact with Ashlie at all. Kozel's lack of involvement continued after Ashlie's death, when Kozel declined to attend the memorial service for Ashlie.

The trial court correctly interpreted the statute and, on the record before it, soundly exercised its discretion in denying the CR 19 motion to intervene.

B. The Court of Appeals Decision in this case Is Consistent with the Division 3 *Blumenshein* Holding.

In *Blumenshein v. Voelker*, 124 Wn.App. 129, 100 P.3d 344 (Div. 3, 2004), the court of appeals held that a mother did not have standing to bring an action under RCW 4.24.010. *Id.* at 134. In that case, prior to the child's injury, the mother had "rarely contributed to the support of the child." *Id.* at 132. Moreover, she had not had significant contact with the child for quite some time prior to the accident. *Id.* The court, reasoning that without the injury no claim could exist, held that the necessary

parental involvement should be assessed at the time of the accident: "Plainly, the legislature intended the necessary parent involvement to be viewed at the time of the accident, not some earlier or later time." *Id.* at 135. *Blumenshein* specifically considered the Legislature's statement of intent limiting parental consortium claims to parents with "significant involvement," and determined that the Legislature sought to avoid the very result Kozel is seeking here, i.e., allowing an absent parent who chose to have little to no involvement in their child's life to show up after the child is injured or dies and assert a loss of consortium claim.

IV. CONCLUSION

The Court of Appeals correctly construed RCW 4.24.010 to limit its application to a time at or near the time of the death or injury of the minor child. The opinion of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of July, 2011.

ANDREWS SKINNER, P.S.

By _____
KRISTEN DORRITY, WSBA #23674
Attorneys for Respondent McGraw Residential Center d/b/a Seattle Children's Home

DECLARATION OF SERVICE

I, SALLY GANNETT, hereby declare as follows:

1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 5th day of July, 2011, I caused a copy of the attached **Respondent McGraw Residential Center's Supplemental Brief to the Supreme Court** to be served upon the following, on or before July 6, 2011, in the manner noted:

Attorneys for appellant Amy Kozel: Jeffrey L. Herman Herman Law Firm LLC 10303 Meridian Avenue N., Suite 300 Seattle, WA 98133-9483 ***Via Legal Messenger***	**Attorneys for Plaintiff:** Lawrence M. Kahn Lawrence Kahn Law Group, P.S. 1621 114th Ave. SE, Ste. 123 Bellevue, WA 98004-6905 ***Via Legal Messenger***
Attorneys for appellant Amy Kozel: Elena Luisa Garella 3201 1st Ave S Ste 208 Seattle, WA 98134-1848 ***Via Legal Messenger***	**Attorneys for Plaintiff:** Lisa Michele Voso Law Office of Lisa Voso 6703 S. 234th Street, Suite 300 Kent, WA 98032-2903 ***Via Legal Messenger***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of July, 2011 at Seattle, Washington.

SALLY GANNETT